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WILLIAM C. RUFF,

Complainant,

v.

Commissioner, OFFICE OF  
COMMISSIONER OF SECURITIES,

Respondent.

Case No. 87-0005-PC-ER

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FINAL  
DECISION  
AND  
ORDER  
ON THE  
MERITS

Complainant charges that respondent retaliated against him in violation of the Wisconsin Fair Employment Act, §§111.231 - 111.395, Stats., when respondent involuntarily transferred him to another position. Following the issuance of a proposed decision by the hearing examiner, objections were filed and the Commission heard oral argument on February 21, 1990. The Commission has considered these objections and arguments, has consulted with the examiner, and now issues the following final decision and order:

FINDINGS OF FACT

1. Complainant began employment as a Securities Examiner I with respondent Office of the Commissioner of Securities (OCS) on June 27, 1982. Through a series of reclassifications he attained his current level of Securities Examiner 3 on April 1, 1986. Prior to his employment with OCS, complainant was an analyst with the Investment Board. Complainant also had formal training and experience in the area of accounting.

2. Prior to the reorganization in December, 1986, the Office of the Commissioner of Securities was comprised of five divisions. These divisions were Licensing and Regulation, which is responsible for reviewing

applications and issuing licenses to broker/dealers and investment advisors, and conducting related complaint investigation, on-sight monitoring, and other surveillance activities; Securities Registration, which is responsible for registering all types of securities before they can be offered for sale in Wisconsin; Franchise Investment, which is responsible for registering franchise types of investments to insure full disclosure to franchisees and adherence to anti-fraud provision of the law; Enforcement, which is responsible for enforcing requirements related to securities and franchise registration, licensing of broker/dealers, agents, and investment advisors, rules of conduct for licensees, and anti-fraud provision of the securities and franchise law; and Administration, which is responsible for the financial, budgetary, personnel and other related administrative operations of the agency.<sup>1</sup>

3. Complainant was initially employed in the Division of Licensing and Regulation (DLR).

4. Mr. Carney was the Administrator of DLR, and complainant's supervisor until he left the agency in June, 1985. From June, 1985 until November 10, 1986, when a new administrator of DLR (Mr. Hojnacki) was hired, the Commissioner of Securities, Mr. Payne was the acting administrator of DLR and complainant's supervisor.

5. Complainant's overall performance since beginning employment with respondent has always been rated as at least satisfactory. Mr. Payne evaluated complainant's performance on only one occasion between June 1985 and November 1986, i.e. November 11, 1986. Mr. Payne evaluated complainant's

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<sup>1</sup> The Commission has added this Finding of Fact to those found in the proposed decision and order so that the remaining findings can be more easily understood. Other findings have been modified so that they better conform to the record.

performance as satisfactory for two tasks (A and B) and above satisfactory for three tasks (C, D, and E). (Respondent's Exhibit #2).

6. On September 21, 1986, complainant formally notified Commissioner Payne that he was interested in being considered for a Securities Examiner 1 position in the Franchise Division. Complainant requested that he be considered at the Securities Examiner 2 level instead of the 1 level and understood that this would be a demotion, with no loss of pay, from his current level of Securities Examiner 3. Complainant applied for the position in part to expand his knowledge and gain additional experience in other areas and in part because of the length of time the administrator position in DLR had been vacant, and the heavy workload.

7. The position in the Franchise Division was filled by Ms. Rice on a promotional basis in keeping with respondent's emphasis on upward mobility and affirmative action to fill entry level professional positions. The appointment was effective September 23, 1986. Complainant, in a handwritten memorandum dated September 24, 1986, withdrew his name from consideration for the position.

8. Complainant worked in DLR with Ms. Wilson and Ms. Kleuver. Ms. Kleuver had been in the Division for eleven years as a Program Assistant prior to being promoted in 1986 to a Securities Examiner I. Ms. Wilson became a Securities Examiner in 1983 in DLR. She interviewed for a position in the Division of Regulation in 1984, because she wanted a job with less travel during her pregnancy.

Ms. Wilson's performance was evaluated on September 30, 1986, by Mr. Payne as Exceptional for two tasks (A and E) and Above Satisfactory for 3 tasks (B, C, and D). (Respondent's Exhibit #3).

Ms. Wilson was on maternity leave from November 10, 1986, until January 12, 1987, at which time she returned to work on a part-time basis.

9. Complainant filed a complaint of sex discrimination on November 7, 1986. Mr. Payne was familiar with the complaint when he made the decision to involuntarily transfer complainant on January 20, 1987. (See Finding of Fact #14).

10. In December of 1986, the respondent implemented a reorganization. The major change in structure was to merge the Division of Franchise Investment with the Division of Registration to form the Division of Securities and Franchise Investment Registration (DSFIR). As a result of this reorganization, Mr. Fischer (formally Administrator of the Division of Registration) was appointed to head the new combined division (DSFIR), and Mr. Korpady (formally Administrator of the Division of Franchise Investment) was involuntarily transferred to the legal staff.

11. At the time of the reorganization, Mr. Payne also involuntarily reassigned Mr. Lloyd (Administrator of the Division of Enforcement) to the legal staff, and appointed an employee from the legal staff (Ms. Struck) to replace him.

12. Mr. Payne had previously transferred an employee (Mr. Horak) from DLR to the Division of Enforcement on September 9, 1985. This transfer was involuntary and Mr. Horak subsequently left the agency on November 22, 1985, because of the transfer. Mr. Horak had previously (around June, 1985) discussed with Mr. Payne his classification level and had indicated to Mr. Payne that transferring out of the agency might be the only way to get ahead.

13. Subsequent to the reorganization in December, 1986, there were two sudden and unexpected vacancies in the new division (DSFIR). Ms. Gilding

transferred to another agency and Mr. Jacobson retired because of medical problems. This left only two professional staff (Macleod and Rice) and one of them (Ms. Rice) had only recently (September 1986) been appointed to an entry level Security Examiner position.

14. Mr. Payne and Ms. Thorn (Administrator of Administrative Services) met in December 1986 to discuss what action should be taken. Complainant's discrimination complaint was discussed to the extent that any personnel action involving complainant might be considered an adverse employment action. Ms. Thorn indicated that as long as complainant's pay, benefits and classification weren't affected, it would not be adverse.

15. Mr. Payne met with complainant on December 16, 1986, to discuss transferring him from DLR to DSFIR. Complainant indicated that he didn't want to be transferred, and that he liked his job. In addition, complainant felt that the position in DSFIR involved less complex and varied duties, more travel and more contact with lower level professionals. This was in contrast to the diversity and higher level of work he felt characterized the licensing and complainant investigation work in his position in DLR.

16. Complainant and Mr. Payne met again on January 5, 1987, to discuss the transfer. Complainant again indicated that he didn't want to transfer and asked that the decision be reconsidered. Complainant said the action was retaliatory and he would appeal it if he could. Mr. Payne indicated complainant should go ahead and then said words to the effect "Your life will be miserable here."

17. On January 6, 1987, Mr. Payne issued a memorandum (Respondent's Exhibit #7) to complainant indicating that he was using his prerogative as appointing authority to transfer him to DSFIR, effective January 20, 1987. The memorandum indicated that the reasons were:

- a) Two sudden and unexpected vacancies in DSFIR;
- b) Complainant had previously indicated an interest in positions both in the old Registration Division and the old Franchise Division;
- c) A new administrator of DLR had been appointed and Ms. Wilson was returning earlier than expected from her maternity leave; and
- d) The transfer of complaint, in Mr. Payne's judgment, best met the staffing requirements of both divisions (DLR and DSFIR).

18. The decision to transfer complainant to a registration position in DSFIR was made by Mr. Payne. At hearing, he articulated the following reasons for his decision.

- a) The two vacancies were unexpected and left only one experienced Securities Examiner. Time was therefore of the essence and there was a need for an experienced person to meet the statutory deadlines. Additionally, Ms. Wilson would be coming back part time from her maternity leave and might not be able to meet the cyclical workload in DSFIR.
- b) Although withdrawn, complainant had earlier indicated an interest in a position in the new DSFIR.
- c) He felt complainant needed more structure and would get more direct supervision. Complainant had earlier asked for more onsite supervision during the period of time Mr. Payne was acting administrator of DLR (6/85-11/86). Complainant felt Mr. Payne did not spend a lot of time in the division, and had sent a memorandum to Mr. Payne expressing his frustration over the length of time that DLR was without

an administrator and concerns about the heavy nature of the staff workload.

d) DLR would still have an experienced Securities Examiner when Ms. Wilson returned and Mr. Payne felt she was the best performer.

e) Mr. Hojnacki had been appointed administrator of DLR and had considerable experience in the private sector. An experienced administrator allowed consideration of Ms. Wilson's request to come back to work part-time.

19. Mr. Payne also thought that Ms. Wilson had done some work for Mr. Hojnacki. The parties stipulated that this did not occur, and that Ms. Wilson was on maternity leave when Mr. Hojnacki was hired.

20. Complainant had only indicated an interest in transferring to position in the Franchise Division, and had not indicated an interest in a position in the Registration Division as indicated in Mr. Payne's 1/6/87 memorandum (Finding of Fact #17).

21. Complainant's need for more structure and direct supervision (Finding of Fact #18c) was not a reason given for the involuntary transfer during the hearing on probable cause.

22. The vacant positions in both DLR and DSFIR were filled on January 20, 1987.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over complainant's claim of discrimination under §230.45(1)(b) and §111.375(2), Wis. Stats.

2. Complainant has the burden of proving by a preponderance of the evidence that respondent violated the Fair Employment Act by retaliating against him for filing a complaint by involuntary transferring him.

3. Complaint has not sustained his burden of proof and it is concluded that respondent did not retaliate against complainant in violation of the Fair Employment Act by involuntarily transferring him from DLR to DSFIR.

DISCUSSION

The issue established for hearing in this case is:

"Whether complainant was retaliated against for having filed complaint No. 86-0141-PC-ER when respondent involuntarily transferred him to another position?"

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 560 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. At the time that the probable cause decision was issued, the Commission held that a "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Smith v. University of Wisconsin-Madison, 79-PC-ER-95, 6/25/82.

Since the time the probable cause decision was issued, the Commission has abandoned its "in part" test for mixed motive cases as espoused in Smith. In the case of Jenkins v. DHSS, 86-0056-PC-ER, 6/14/89, the Commission adopted the causation test set forth in the Supreme Court's decision in Price



Waterhouse v. Hopkins, 104 L Ed 2d 268, 5/1/89. In Jenkins, (beginning at page 20) the Commission stated that a respondent could avoid a finding of discrimination at the liability phase by using an affirmative defense showing that the same action would have been taken even in the absence of any improper motive. This causation test had previously been applied by the Commission only at the remedy stage.

Complainant has met his initial burden and established a prima facie case of retaliatory discrimination. Namely, that complainant had participated in a protected activity which the alleged retaliator was aware of: filing of discrimination complaint No. 86-0141-PC-ER; there was an adverse employment action: involuntary transfer; and there was a causal connection between the two: the involuntary transfer occurred a little over two months after the filing of the complaint.

The burden of proceeding then shifts to the respondent to articulate legitimate, non-discriminatory reasons for its actions. These reasons are identified in Finding of Facts #15 and #19. Specifically, two unexpected professional vacancies occurred in DSFIR which necessitated the immediate transfer of an experienced staff member to meet statutory deadlines. At the time these vacancies occurred, the Office of the Commissioner of Securities had the following professional staff employed in each of their divisions.<sup>2</sup>

- a.) Division of Enforcement  
Mark Dorman  
Fred Reed
  
- b.) Division of Licensing and Regulation  
Judith Wilson (on maternity leave)  
Helen Kleuver  
Complainant

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<sup>2</sup> Professional Staff in the Administration Division and in the Office of Legal Counsel are not listed because of the specialized nature of their positions and/or their lack of experience/knowledge to perform the functions of the vacant positions.

c.) Division of Securities and Franchise Investment  
Registration  
Cheryl Macleod  
Kathryn Rice  
Vacancy  
Vacancy

In reviewing the staff available, Mr. Payne chose not to transfer Mr. Dorman because he was a Securities Examiner 4 and had recognized expertise as an investigator. Mr. Reed had transferred into the Enforcement Division in 1985. Based on the fact that his previous experience was as an investigator and he was still learning the examiner function, respondent determined that Mr. Reed would not be an appropriate person to transfer into DSFIR.

In the Division of Licensing and Regulation (DLR), Ms. Kleuver had just recently been promoted to a Securities Examiner 1. (See Finding #8). She had been in the DLR for 11 years providing administrative and clerical support to the professional staff. While she was familiar with the operations of DLR, Mr. Payne did not transfer Ms. Kleuver her because of her limited experience as an examiner and her responsibility to train the replacement in her former Program Assistant position.

Ms. Wilson was on maternity leave at the time of the vacancies, and had asked to come back part time. Mr. Payne felt that Ms. Wilson was the best performer (See Finding #8) in DLR based on her response to specific requests he made and overall ability to complete her work. Based on this performance consideration and the fact that a part-time employe might not be able to meet the cyclical nature of the work in DSFIR, Mr. Payne determined that he wouldn't transfer Ms. Wilson out of DLR.

In addition to those reasons described above for not selecting either Mr. Dorman, Mr. Reed, Ms. Kleuver, and Ms. Wilson, complainant was selected

for transfer, among other reasons, because of his accounting background, his previous work experience with the Investment Board which provided him a opportunity to review investment vehicles, and his familiarity with securities registration activities.

The staff remaining in DSFIR was comprised of one experienced staff member (Ms. Macleod) and a recently appointed examiner (Ms. Rice). Ms. Rice was promoted from a Program Assistant to a Securities Examiner 1 in September, 1986 (See Finding #7).

Since DSFIR had only one experienced examiner and DLR had two experienced examiners, an experienced examiner was transferred from DLR to DSFIR so that each Division would have one position to fill with a new employee. Notwithstanding that the new administrator of DLR was experienced, the transfer action would avoid having 3 new examiners (out of total staff of four) in the DSFIR. On their face, these staffing and workload reasons are both legitimate and non-discriminatory.

The burden of proceeding then shifts to complainant to demonstrate that these reasons are a pretext for retaliation.

Complainant put forth a number of arguments that the reasons given for transferring him were a pretext for retaliation. In order to address the arguments of both parties in a systematic way, each of the reasons articulated in Mr. Payne's January 6, 1987, memorandum (Finding #17) will be addressed separately.

1.) There were two sudden and unexpected vacancies in DSFIR

There was no dispute that the vacancies occurred suddenly and were unexpected (Finding #13). While Mr. Jacobson had been ill and there were rumors that he would retire, it was not known specifically when he would retire until December of 1986. While complainant did not disagree that the

vacancies were sudden and unexpected, he did raise several arguments concerning the response of management to this situation, namely the use of a transfer.

Complainant notes that the respondent had an opportunity in September of 1986 to transfer him to a vacant examiner position in the Franchise Division, but chose instead to promote Ms. Rice who had previously worked for respondent as a Program Assistant. Complainant's transfer request and the respondent's decision to promote Ms. Rice preceded both the reorganization of the agency and the unexpected vacancies which resulted from the departure of Ms. Gilding and Mr. Jacobson from DSFIR. The respondent justified its September of 1986 decision not to transfer the complainant by pointing to the agency's desire to provide its employees with promotional opportunities, and to the affirmative action consequence of selecting a female for the vacant examiner position. Three months later (December, 1986) when the respondent was deciding what to do with the vacancies in DSFIR, a different situation existed, in that only one of the four professional staff positions in DSFIR was filled by an experienced employe.

Complainant also argues that a different management style was used in handling his transfer. Specifically, Complainant points to the fact that Mr. Horak was told by Mr. Payne (in regard to his transfer) that he didn't have to do anything he did not want to. In testimony, Mr. Horak confirmed that Mr. Payne said that; however, his transfer was handled primarily by Mr. Payne's deputy. Nevertheless, Mr. Horak stated that no matter what was said, he didn't feel like he had a choice, particularly when he was told that the respondent could unilaterally reassign him. He acquiesced to the transfer, but left the agency two months later because of it.

Based on the record, respondent treated all the persons they transferred similarly. Respondent would first discuss the situation and indicate it wanted the employe to transfer. This was an attempt to have the employe think about transferring and consider doing it voluntarily. If that was not successful, it would either in the first meeting or subsequently indicate that it could transfer the employe without his/her consent. A similar process was used in the Horak transfer and in the Lloyd and Korpady transfer/reassignment. There is no indication that complainant was treated differently than any other employe in a similar situation.

Complainant contends, however, that the Horak, Lloyd and Korpady transfers are distinguishable and should not be relied upon for the purpose of showing he was treated consistently with other employes. The complainant points out that Mr. Korpady's position was eliminated as a result of a reorganization (and non-selection for the newly created DSFIR administrator position), and therefore he had to be transferred. Mr. Lloyd was demoted from a management (Division Administrator) position to a staff position on the legal staff because of performance problems. In comparing complainant's transfer to the Horak, Lloyd, and Korpady transfers, the Commission does not conclude that the underlying reasons for each of the actions was similar, but does find that the respondent used one type of personnel action to resolve three different problems. Namely, the respondent unilaterally transferred/reassigned employes to other positions without the input of the affected employes.

This is further highlighted by Mr. Payne's testimony that Mr. Lloyd objected to his involuntary movement. Complainant stated that Mr. Lloyd had no recourse because of his performance problem and Mr. Korpady had to go somewhere because his position had been abolished in the reorganization. Other than Mr. Lloyd's objection, the record doesn't indicate how these

employees felt about their transfer/reassignment. While complainant characterized them as having little or no other choice, it is not difficult to surmise that they might disagree with the evaluation of their performance, or their non-selection for a position which precipitated their movement, and feel that there were some other options to address their situation.

In the case of the involuntary transfer of Mr. Horak there are many similarities to the way the complainant's transfer was handled. Complainant argues in this instance that there is a discrepancy between Mr. Payne's testimony that Mr. Horak asked to be transferred, and Mr. Horak's statement to an investigator of the Personnel Commission that he did not ask to be transferred. During Mr. Horak's testimony he indicated that he had talked to Mr. Payne about his classification level because he felt he was under-classified. During that conversation, he told Mr. Payne that transferring out of the agency appeared to be the only way to get ahead. Mr. Horak's testimony is not fundamentally inconsistent with either Mr. Payne's version of the conversation or the prior statement made by Mr. Horak to the investigator.

Mr. Payne indicated that Mr. Horak was transferred to the Enforcement Division because the aggressiveness with which he did his work in DLR could better be used in the Enforcement Division. While it is true that Mr. Horak did not explicitly request a transfer to the Enforcement Division, he did effectively suggest a transfer during his conversation with Mr. Payne. Complainant's argument that the Horak transaction is not similar is not persuasive, and the Commission concludes that Mr. Horak's transfer (when considered along with the actions taken to transfer/reassign Mr. Lloyd and Mr. Korpady) establishes that the respondent had, in the past, not been reluctant to use an involuntary transfer in order to best utilize its staff.

2.) Complainant had previously indicated an interest in positions in both the old Registration and Franchise Divisions

While respondent's letter transferring complainant stated the complainant had indicated an interest in positions in both the Division of Franchise Investment and the Division of Securities Registration before they were merged into the Division of Securities and Franchise Investment Registration, the record reflects that complainant had indicated an interest only for a position in the Franchise Investment Division. (See Finding #6) Complainant subsequently withdrew his transfer request. (See Finding #7)

While complainant was transferred to a position in the new division (DSFIR) which was assigned duties which prior to the reorganization would have been in the Securities Registration Division as opposed to the Franchise Investment Division, there is nothing in the record which establishes that Mr. Payne did not actually believe that the complainant had been interested in positions in both of the old divisions.

In addition, complainant points out that Mr. Payne had stated during the hearing that he didn't know why Mr. Ruff wanted to transfer out of DLR. Later in the hearing after being shown his interview notes, Mr. Payne noted that Mr. Ruff was asked why he wanted to transfer. The Commission does not find this inability to recall why complainant wanted to transfer significant, even when combined with the incorrect assumption made relative to what position complainant had previously indicated an interest in 1986.

3.) A new administrator of DLR had been appointed and Ms. Wilson would be returning early from her maternity leave

Mr. Payne testified that Ms. Wilson was the best performer in DLR and that her part-time status when she returned from leave might not be suited to the cyclical workload in DSFIR. In addition, a new administrator of DLR

(Mr. Hojnacki), who had experience in the securities field, had just been appointed. This appointment was not only considered a plus for the division but also allowed Mr. Payne to formally consider Ms. Wilson's part-time employment request.

Complainant argues that they transferred him without asking anyone else to transfer. Specifically, complainant stated that he told Mr. Payne during their December 16, 1986, meeting that Ms. Wilson might be interested in a transfer and should be contacted. Mr. Payne does not recall saying he would call her, and did not make any contact with her concerning transfer. In direct testimony, Ms. Wilson said she would not have agreed to transfer from DLR to DSFIR. Additionally, Mr. Payne felt Ms. Wilson should stay in DLR because of her performance and her request for part-time status. The fact that Ms. Wilson was not contacted and does not show any pretext on respondent's part, but rather that transfer of Ms. Wilson was not an option they considered viable.

Complainant also points out that Mr. Payne stated Ms. Wilson had done some work for Mr. Hojnacki. However, he didn't talk to Mr. Hojnacki either about the transfer or whether Wilson had or had not worked for him. Later he admitted that he was mistaken about this since Ms. Wilson left on maternity leave at the same time Mr. Hojnacki was hired.

Mr. Payne's belief that Ms. Wilson worked for Mr. Hojnacki was not the only reason he relied on when he decided to transfer Ms. Wilson from DLR. The major reason for that decision were Ms. Wilson's excellent performance and part-time status. Therefore, the fact that Mr. Payne also incorrectly thought she did some work for Mr. Hojnacki is not indicative of pretext.



4.) The transfer of complainant best met the staffing requirements of both divisions (DLR and DSFIR).

Mr. Payne determined that he needed to transfer an experienced examiner into DSFIR to address both the statutory deadlines and the increased workload associated with the bull market. As indicated previously, Mr. Payne had previously transferred other staff to address issues and concerns he had about how to meet program needs and best utilize staff. In reviewing the existing staff, Mr. Payne determined that transferring complainant best met the needs of the agency.

Complainant offers a number of arguments related to deadlines, budgetary requests, and what constitutes an experienced analyst to show that these reasons are a pretext for discrimination. As it relates to deadlines, complainant states that the statutory deadlines in DSFIR are no more critical or demanding than those in DLR. Complainant rebutted Mr. Payne's testimony that there were deadlines in DLR with his statement from the previous probable cause hearing where he stated that there "were no specific deadlines with which we had to be concerned." Considerable testimony was given about deadlines and how they were established or triggered in both DSFIR and DLR. Two things became apparent from the testimony. The complainant had a better grasp of the technical aspects (including timeframes) of the work in both divisions and what the actual work flow was than did Mr. Payne. Mr. Payne had a more general knowledge of the timeframes for processing various applications, registrations, or securities offerings. His concern was that in the bull market of 1986, the number of securities offerings were increasing rapidly. If his agency didn't respond within a specified time period, the securities could be offered in Wisconsin without their review.

Whether the deadlines in DSFIR (related to registration of securities) or in DLR (related to licensing of broker-dealers, agents and advisors) are more critical or demanding is not a decision the Commission must make. It is the responsibility of the agency head to make such policy decisions based on his/her evaluation of the agency's goals and mission. Here, Mr. Payne decided that securities registration was to be a higher priority than licensing.

The Commission does not conclude that Mr. Payne's testimony must result in a conclusion that there are no deadlines in DLR but only that Mr. Payne was not as concerned about these deadlines as he was about those that applied to DSFIR. Mr. Payne put forth these arguments about deadlines and timeframes to elaborate on why he thought it was more important to have an experienced examiner in DSFIR to deal with the deadlines in that area and not that deadlines in one area were more important than another. The Commission concludes that Mr. Payne's concern about deadlines was reasonably founded on what he believed to be the situation and does not show pretext for retaliation.

Complainant argues further that Mr. Payne's reference to deadlines and workload are inconsistent with the budget request he made for the 1987-1989 biennium. Complainant testified that the biennial budget request of the agency actually contained a request for two more positions in DLR. Additionally, complainant rebutted respondent's testimony that they didn't know in December, 1986, that they might lose another position in DSFIR. During the probable cause hearing, Ms. Thorn stated that she had received some indication from the Department of Administration (DOA) Budget Office that they might lose a position in DSFIR. The respondent actually did subsequently lose a position in DSFIR, but that decision was not finalized by DOA until after complainant's transfer.

Additionally, complainant argued that in requesting new positions in DLR the respondent was saying that DLR workload was heavier and more critical because they needed additional staff. Complainant reviewed the agency's biennial report and pointed out workload figures for both DSFIR and DLR. The figures appeared to show some workload increases in both divisions and complainant argued that they were inconsistent with his transfer and the high priority put on securities registration.

The Commission cannot agree that there are inconsistencies which prove pretext. First, the budget request was for the 1987-89 biennium which would begin July 1, 1987. Second, the budgetary request to add staff in DLR was based on longer term workload considerations, while the decision to transfer complainant from DLR to DSFIR was based on how best to use the experienced staff of the department to resolve an immediate concern. In addition, respondent did not learn of the final result of their budget request until months after the decision to reassign the complainant.

The Commission concludes that the respondent addressed its longer term workload concerns through the budget process and addressed its shorter term concerns regarding the completion of DSFIR responsibilities by transferring an experienced employe into DSFIR. The Commission does not see the short term and long term concerns to be interrelated in terms of the complainant's burden of showing pretext arising from the action to involuntarily transfer him.

Complainant further alleges that he was not an experienced examiner in relation to the position into which he was transferred. Complainant points out that he started in his new position at DSFIR the same day as the two new Securities Examiner 1's started, and he needed to be trained in the new position in DSFIR just like the new employes. While it is true that complainant did

require some training/orientation in his new position since he was working in a different area of securities, he was transferred as a Securities Examiner 3. The new employes were hired as Security Examiner 1's. Certainly the familiarity that complainant had with the respondent's operation and with the securities field in general would be a major asset in learning and performing the functions of the new position. While the backgrounds of the new employes were not specifically identified, it can be assumed that their general base of knowledge was less than complainant's, particularly since they were hired at the entry level.

Complainant's argument that he really was not an "experienced" examiner is appropriately made only in the context of the new position's specific duties and responsibilities. The Commission finds that complainant was an experienced analyst in the context of general operational and organizational knowledge. While complainant may not have performed the specific duties of the new position dealing with mutual funds, there was no evidence which suggested that his experience in dealing with equity (stock) and debt matters in his previous position did not relate closely to the types of knowledge or experience needed to perform the job into which he was transferred. Respondent's reasons for wanting to transfer complainant rather than to have hired 3 entry level examiners in DSFIR in order to take advantage of complainant's related experience is legitimate and non-discriminatory, and complainant's arguments do not show them to be pretextual.

In addition to complainant's arguments made relative to respondent's reasons for transferring him, he also pointed out the following additional items as proof that respondent retaliated against him.

1.) New reason given by respondent for transferring complainant.

The "new" reason given by respondent was that complainant needed more structure and direct supervision. This was based in part on complainant's memorandum to Mr. Payne concerning the lack of onsite supervision. (See Finding #18c) The "new" reason given for transferring complainant does not appear either in the 1/6/87 memorandum of transfer, or as a reason in the probable cause hearing. Although Mr. Payne indicated that he considered it, it was not included in his memorandum which outlined the reasons for the transfer (Finding of Fact #19). The Commission does not find that Mr. Payne's testimony is lacking in credibility because of the "new" reason, nor is there any indication that this new reason establishes any intent or predisposition of Mr. Payne to retaliate.

In addition, respondent stated that the complainant would get more direct supervision from the Administrator of DSFIR (Mr. Fischer), who would be his supervisor in the new position. Mr. Payne testified that Mr. Fischer liked a structured environment and was a hands-on supervisor who followed procedures and paid considerable attention to detail. This was a more structured environment than was provided in DLR during the time that Mr. Payne was acting administrator (6/85-11/86).

Respondent also pointed to Mr. Payne's evaluation of Mr. Ruff in November, 1986. This evaluation (Respondents' Exhibit #2) contains a comment which identifies complainant's need to better organize his field work so that it would be completed more timely. This, coupled with complainant's previous request for more onsite supervisor, does not in the Commission's opinion show pretext for retaliation. Rather, it shows that the transfer was consistent with what respondent felt would best meet the agency's needs.

The decision to transfer complainant was based on Mr. Payne's belief that the information in the memorandum was correct and there is no requirement that every consideration used in making this decision has to be enumerated in writing. The Commission believes that Mr. Payne's testimony was credible and meant to elaborate on what he said in his memorandum and is based on what he believed to be the facts. There is nothing in the record to indicate that these facts and the reasons given for the transfer defied reason or showed pretext for discrimination.

2.) The New Job was Less Desirable

Complainant argued that the job he was transferred to had less complex and varied duties than his previous position, and didn't involve work that was as difficult. (See Finding #15) While it is clear that the complainant felt strongly about this, the record shows that all staff examiner positions in DLR and DSFIR are similarly classified, have the same progression potential, and are located in the same office building. While these facts, in and of themselves, do not necessarily prove that complainant's transfer was not retaliatory, the Commission does conclude that the action did not adversely affect complainant's current or future pay and benefits or the physical location of his job.

3.) Mr. Payne's Comment

Complainant testified that during the meeting on January 5, 1987, to discuss the transfer, Mr. Payne said something like, "Life will be miserable for you here." Finding #16 describes the statement in the context of the conversation held between complainant and Mr. Payne.<sup>3</sup>

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<sup>3</sup> The proposed decision describes each party's testimony concerning this statement, but does not make any actual finding as to whether Mr. Payne indeed made the statement. In consultation with the examiner, the Commission now finds Mr. Payne did not make the statement.

The decision to transfer complainant was made on or before December 16, 1986. Consequently, the decision on the transfer action was made by Mr. Payne before the statement and not after. However, such a statement is consistent with a general disposition or willingness to retaliate, and the Commission concludes that the transfer decision was at least partially motivated by anger at complainant for having filed his earlier complaint. However, this conclusion does not resolve this matter. As will be discussed below, the Commission must consider the effect of respondent's "mixed motive" under the framework provided by Price-Waterhouse. The Commission will first address some of the other points raised by complainant.

Complainant has raised a number of other issues in his objections and oral arguments in which he refers to the findings contained in the probable cause decision. In his objections to the proposed decision in this matter, the complainant writes:

In this decision on [probable] cause, the hearing officer found in my favor because, as stated: "a number of the reasons assigned by management fit its decision to choose the complainant for transfer turned out to be contradicted by the facts brought out at a hearing ..." Thus there was probable cause that retaliation occurred because respondent, and the reasons for the transfer, were found to be not credible.

At the probable cause stage of a Fair Employment Act proceeding, the complainant has a lesser burden than at the subsequent stage where the claim of retaliation is reviewed, as here, on the issue of whether illegal retaliation occurred. Winters v. DOT, 84-0003, 0199-PC-ER, 9/4/86. Because a finding of probable cause is premised on a less demanding degree of proof, it does not translate into a finding of illegal retaliation at a hearing on the merits. In order to find that a respondent has illegally retaliated or discriminated against a complainant, the complainant must present a preponderance of evidence to

support the allegation. This, rather than probable cause, is the standard which complainant must meet.

Additionally, complainant identified a number of discrepancies and inconsistencies during oral argument which repeated certain contentions brought up at the hearing. In all of the arguments made by complainant, there is the allegation that Mr. Payne lied: i.e., either misrepresented the facts or made up reasons after the fact based on these allegations, the complainant suggests that Mr. Payne is not credible. In making a credibility determination, the Commission considered Mr. Payne's demeanor during the hearing, what Mr. Payne knew or reasonably believed to be the facts, and whether the reasons put forth by Mr. Payne were either unfounded or defied reasons. While Mr. Payne may have been mistaken about certain of the facts which supported his reasons for transferring complainant, the Commission finds that this testimony was credible.

Based on the above, the complainant has shown that respondent's decision to transfer the appellant to DSFIR was in part motivated by an intent to retaliate against the complainant for having filed a prior discrimination complaint. However, using the Price Waterhouse test, the Commission concludes that the respondent has shown it would have made the same decision to transfer complainant from DLR to DSFIR based only on their evaluation of how best to meet the agency's staffing needs. Specifically, there were two unexpected vacancies in DSFIR; Mr. Payne needed to transfer an experienced person to limit the number of new employes that would have to be hired in DSFIR; an experienced staff member (Wilson), who Mr. Payne felt was the best performer, was returning to DLR early from leave; and a new administrator of DLR (Hojnacki) was being appointed who had experience in the securities field.



The respondent has shown that complainant was an experienced examiner, and that he was the most appropriate choice based on the pool of examiners (Mr. Reed, Mr. Dorman, Ms. Kleuver, Ms. Wilson) available for transfer. The complainant had more experience in performing examiner functions than Mr. Reed and Ms. Kleuver. He was available on a full time basis as opposed to Ms. Wilson who was returning to part-time status from a maternity leave. Finally, Mr. Dorman was a recognized enforcement expert who Mr. Payne needed to retain in the Enforcement Division.

The complainant argues that respondent didn't need to transfer anyone. Certainly, management has the right to utilize its work force in a way it determines will best meet its program needs. The Commission agrees with the complainant that these management rights must be exercised in accordance with the Fair Employment Act. However, based on the reasons identified above, the Commission finds that the respondent has met its burden under the causation test in Price Waterhouse by showing that they would have made the same decision even absent any retaliatory motive.

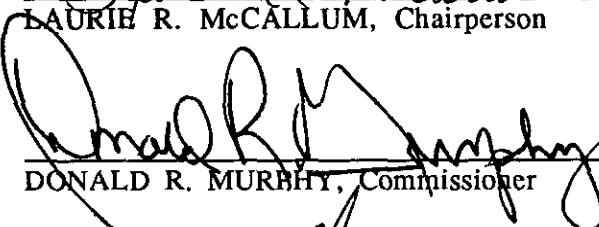
ORDER

Based on the conclusion that respondent did not retaliate against complainant in violation of the Fair Employment Act by involuntarily transferring him, this complainant is dismissed.

Dated: May 16, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

GFH:gdt

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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